MOHD SAID SAMAD

v.

PUBLIC PROSECUTOR

FEDERAL COURT, KUALA LUMPUR
CHONG SIEW FAI CJ (SABAH & SARAWAK)
EDGAR JOSEPH JR FCJ
NH CHAN JCA
[CRIMINAL APPEAL NO: 05-10-94]
9 DECEMBER 1997

CRIMINAL LAW: *Dangerous drugs - Trafficking in cannabis - Presumption of trafficking - Dangerous Drugs Act 1952, s. 37(da) - Element of possession - Whether to be substantively proved - Whether presumption of trafficking under s. 37(da) can arise when possession has only been presumed, and not proved, under s. 37(d) - Dangerous Drugs Act 1952, ss. 37(d), 37(da), 39B(1)(a)*

WORDS AND PHRASES: *"Found in possession" - Dangerous Drugs Act 1952, s. 37(da) - Whether includes 'presumed possession'*

The appellant was convicted of an offence under s. 39B(1)(a) Dangerous Drugs Act 1952 ('the Act') for trafficking in 639.3 grammes of cannabis and was sentenced to death. In the court below, evidence was led which showed *inter alia* that the offending drugs were recovered from a bag that the appellant was holding. The learned trial judge, in the circumstances, found the appellant to be in custody or control of the cannabis and, by virtue thereof, to also be in possession of the drugs and to have known the nature thereof under s. 37(da) of the Act. The learned judge then went further and ruled that, by reason of the weight of the cannabis, s. 37(da)(vi) of the Act applied with the result that the appellant was deemed to be trafficking in the drugs. The appellant appealed and argued before the learned judges herein, *inter alia*, that: (i) upon the authority of *Leong Bon Huat v. Public Prosecutor* the analysis of the plant-material by the chemist was unsatisfactory; (ii) upon the authority of *Alcontara Ambrose v. Public Prosecutor* the learned trial judge ought to have invoked s. 114(g) of the Evidence Act 1950 against the prosecution for the failure to tender as exhibit the search list herein; and (iii) upon the authority of *Mohammed bin Hassan v. Pendakwa Raya* the learned trial judge had erred when he invoked the presumption of trafficking under s. 37(da) of the Act based on the presumption of possession and knowledge under s. 37(d) thereof.

Held:
Per Chong Siew Fai CJ (Sabah & Sarawak)

[1] What happened in this case ought to be distinguished from the facts in *Leong Bon Huat v. PP*. The chemist here had carried out a 100% check of the plant material vide the physical and microscopic examinations, as well as examined 20 random samples thereof by Dequenois Levine Test and the Thin Layer Chromatography Test. He had also explained in some detail the four tests and the purposes thereof. And based on the four tests he concluded that the plant-material seized was 'cannabis as defined in s. 2 of the Dangerous Drugs Act 1952'. The evidence of the chemist amply established that the plant-material was cannabis.

[2] *Alcontara Ambrose* is distinguishable. There the trial judge relied on the search list to resolve the conflict in evidence whereas in the instant case, the learned trial judge did not rely on the search list at all.

[3] The learned trial judge erred when he invoked the presumption of trafficking under s. 37(da) of the Act based upon the presumption of possession and knowledge under s. 37(d) thereof.

[3a] It is clear that, even where a specified drug reaches the minimum quantity as stated in s. 37(da) of the Act, the said subsection cannot be rendered applicable merely because the presumption of deemed possession and deemed knowledge of the nature of the drugs under s. 37(d) had been properly invoked. On the wording 'found in possession' in s. 37(da), it is our view that, to validly invoke the presumption of trafficking under the said subsection, apart from meeting the required minimum quantity, there must be an affirmative finding of possession based on sufficient and admissible evidence.

[Appeal allowed; conviction and sentence of court below quashed and set aside and substituted with a conviction under s. 6 of the Act and a sentence of 12 years' imprisonment plus 10 strokes of whipping.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Perayu telah disabitkan dengan kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta') kerana mengedar 639.3 ganja dan telah dijatuhkan hukuman mati. Di mahkamah di bawah, keterangan telah dikemukakan yang menunjukkan, antara lain, bahawa dadah berkenaan didapati dari sebuah beg yang dipegang oleh perayu. Hakim perbicaraan, dalam halkeadaan sedemikian, mendapati perayu mempunyai jagaan dan kawalan terhadap ganja tersebut dan, atas alasan itu, juga mempunyai pemilikan dan pengetahuan dadah berkenaan di bawah s. 37(da) Akta. Hakim yang bijaksana kemudiannya memutuskan

bahawa, bersebabkan berat dadah, s. 37(da)(iv) Akta menjadi terpakai dan oleh kerana itu perayu dianggapkan telah mengedar dadah tersebut. Perayu merayu dan berhujah di hadapan hakim-hakim yang bijaksana di sini, antara lain, bahawa (i) berdasarkan autoriti *Leong Bon Huat lwn. Public Prosecutor* analisa yang dilakukan oleh ahli kimia terhadap bahan tumbuhan adalah tidak memuaskan (ii) berdasarkan autoriti *Alcontara Ambrose lwn. Public Prosecutor* hakim perbicaraan yang bijaksana seharusnya mengenakan anggapan s. 114(g) Akta Keterangan 1950 terhadap pendakwaan atas kegagalan mereka mengemukakan sebagai eksibit senarai geledah di sini (iii) berdasarkan autoriti *Mohammed bin Hassan lwn. Pendakwa Raya* hakim perbicaraan yang bijaksana telah tersilap apabila beliau menggunapakai anggapan mengedar di bawah s. 37(da) Akta dengan berlandaskan anggapan pemilikan dan pengetahuan di bawah s. 37(d).

Diputuskan:
Oleh Chong Siew Fai HB (Sabah & Sarawak)

[1] Apa yang berlaku dalam kes ini harus dibezakan dengan fakta yang terdapat dalam kes *Leong Bon Huat lwn. Public Prosecutor*. Ahli kimia di sini, melalui kaedah pemeriksaan fizikal dan mikroskop, telah menjalankan pemeriksaan 100% terhadap bahan tumbuhan, dan telah juga memeriksa 20 contoh-contohnya melalui Ujian-ujian Dequenois dan Thin Layer Chromatography. Beliau juga telah menerangkan dengan agak terperinci tentang keempat-empat ujian berkenaan serta tujuan-tujuannya. Dan berdasarkan empat ujian tersebut, beliau telah merumuskan bahawa bahan tumbuhan tersebut adalah 'ganja seperti yang ditakrif dalam s. 2 Akta'. Keterangan ahli kimia, dengan itu, membuktikan dengan amat jelas bahawa bahan tumbuhan tersebut adalah ganja.

[2] *Alcontara Ambrose* harus juga dibezakan. Di situ, hakim perbicaraan telah bergantung kepada senarai geledah untuk menyelesaikan pertelingkahan dalam keterangan sedangkan dalam kes semasa, hakim perbicaraan yang bijaksana langsung tidak bergantung kepada senarai geledah.

[3] Hakim perbicaraan yang bijaksana tersilap bilamana beliau menggunapakai anggapan mengedar di bawah s. 37(da) Akta dengan beralaskan anggapan pemilikan dan anggapan pengetahuan dalam s. 37(d).

[3a] Ianya jelas bahawa, walaupun dadah berkenaan sudah mencecah kuantiti minima sebagaimana yang ditetapkan oleh s. 37(da) Akta, seksyen kecil tersebut tidak boleh digunapakai semata-mata kerana pemilikan dan pengetahuan yang dianggapkan telah dibangkitkan dengan teraturnya.

Berdasarkan perkataan 'didapati ada dalam pemilikannya' yang terdapat dalam s. 37(da), kami berpendapat, bahawa, untuk mengenakan anggapan mengedar di bawah seksyen kecil ini dengan sahnya, selain dari perlu memenuhi syarat kuantiti minima, mestilah juga ada satu dapatan pemilikan yang afirmatif yang dilandaskan kepada keterangan yang mencukupi dan boleh diterima.

[Rayuan dibenarkan; sabitan dan hukuman mahkamah di bawah dibatal dan diketepikan dan diganti dengan sabitan di bawah s. 6 Akta dan hukuman pemenjaraan selama 12 tahun serta 10 sebatan.]

Cases referred to:
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 ***(dist)***
Leong Bon Huat v. PP [1993] 3 CLJ 603 ***(dist)***
Mohammad Hassan v. Pendakwa Raya [1998] 2 CLJ 170 ***(foll)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 6, 37(d), (da)(vi), 39B(1)(a)
Evidence Act 1950, s. 114(g)

[Appeal from High Court, Kota Bharu; Criminal Trial No: 47-28-90]

For the appellant - Latifah Ariffin; M/s Latifah Ariffin & Co
For the respondent - Mohd Yusof Zainal Abidin

Reported by WA Sharif

JUDGMENT

Chong Siew Fai CJ (Sabah & Sarawak):

On 30 January 1994, the appellant was convicted of trafficking in 639.3 grammes of cannabis, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (hereinafter referred to as 'the Act') and sentenced to death. The offence was alleged to have been committed on 20 July 1990 at about 5.40pm in a bus-shelter in Kampung Alor Pasir, Pasir Mas, Kelantan. The appellant appealed. On 26 July 1997, we allowed the appeal, quashed the conviction and set aside the death sentence. In place thereof, we entered a conviction under s. 6 of the Act and sentenced the appellant to a term of imprisonment of 12 years with effect from the date of his arrest and 10 strokes of whipping. We indicated that reasons for the reasons for the judgment would be given later, which we now do.

Case For Prosecution

Briefly, the case for the prosecution may be summarised as follows: On 20 July 1990 at about 5.40pm. PW5 ASP Anuwar bin Naemat led a police party, including PW6 Corporal Majinan Sani to a bus-shelter in Kampung Alor Pasir in a car. At the bus-shelter, PW5 saw PW2, Awang bin Teh, a fruit seller, and the appellant who was holding a blue and black bag (exh. 14). PW5 got down from the car and pretended to be interested in buying some pineapples. Upon his equiry, PW2 said each pineapple cost RM2. Thereupon PW5 immediately approached the appellant and asked him about the contents of the bag (exh. 14). When two of his men alighted from the car and joined him, PW5 seized and opened the bag and found therein, *inter alia*, three packages wrapped in newspaper, each package containing a slab of dried plant-material that had been split into two. Subsequently PW5 also found, inside the bag exh. P14, a brown waist pouch (exh. P20) containing, *inter alia,* the appellant's wallet, international passport, account-book and a tin of 'Code 10' hair-cream. The appellant was arrested and brought to the Rantau Panjang Police Station. PW5's evidence about the arrest was substantially corroborated by PW6 and PW2. PW1, Lim Ah Lee, the chemist, testified that, after analysis, the contents of the three packages were cannabis as defined in s. 2 of the Act, weighing 186.7 grammes, 218.8 grammes and 233.8 grammes of respectively totaling 639.3 grammes.

On the above evidence, the learned trial judge ruled that a *prima facie* case had been made out and called on the appellant to enter upon his defence. He was satisfied that the appellant was in custody or control of the said cannabis and therefore was deemed under s. 37(d) of the Act to have been in possession of the drug and to have known the nature thereof. Furthermore by reason of the weight of the cannabis, he held that s. 37(da)(vi) applied and the accused was deemed to be trafficking in the said drug.

Defence

The appellant gave sworn evidence.

In essence, his defence was that the bag (exh. P14) was not the one he carried. He claimed that on 20 July 1990 at about 3pm in his sister's house in Golok he bought RM30 worth of ganja for his own consumption from two friends. The ganja was wrapped in a package (as opposed to the three packages stated by PW5) which he put in a green bag (as opposed to the blue and black bag (exh. P14) described by PW5). The appellant claimed that when he was arrested, the bag seized from him was the green bag and not exh. P14. He, however, denied that he was a drug addict.

Judgment

The learned trial judge disbelieved the story of the appellant. He found that the defence had not raised any reasonable doubt on the prosecution's case, there being no reason why PW5 would frame the appellant by switching the bags since both of them did not previously know each other. The learned trial judge rationlised that instead of changing the bags, PW5 could have easily put the three packages of cannabis in the bag the appellant allegedly carried if PW5 had really wanted to plant the cannabis on the appellant. The learned trial judge considered the story of the appellant carrying a different bag at the time of his arrest no more than a ruse intended to confuse the court. He held that the appellant had failed to rebut the statutory presumptions under s. 37(d) and (da) on a balance of probabilities and found him guilty as charged.

Appeal

Before us, learned counsel for the appellant submitted, firstly, that the learned trial judge, at the close of the case for the prosecution, had failed to consider the elements of possession and knowledge, and the application of s. 37(d) of the Act (ie, the presumptions of possession of drug and knowledge of the nature thereof).

We found no substance in the contention. A perusal of the judgment clearly showed that the learned trial judge not only had applied the said s. 37(d) but also had, by virtue thereof, invoked s. 37(da) of the Act. We shall say more about the application of the double presumptions under the two subsections at a later stage.

Next it was contended, though somewhat feebly, that the analysis of the plant-material by the chemist, PW1 Lim Ah See, was unsatisfactory. *Leong Bon Huat v. PP* [1993] 3 MLJ 11 SC was cited in support. In that case the results of the physical examination and the microscopic examination of the plant-material were not made known. Neither was it clear whether the Dequenois Levine test and the Thin Layer chromatography test were carried out. What the chemist had said of relevance was "... the total weight of samples taken for analysis was more than 10% of the net weight of 793.85g." On the other hand, in the instant appeal before us, the chemist had carried out 100% check of the plant-material by both physical and microscopic examinations, as well as examined 20 random samples thereof by Dequenois Levine test and the Thin Layer chromatography test. He explained in some detail the four tests and the purposes thereof. From the former two tests, the chemist found botanical and morphological features peculiar to cannabis as well as a lot of cannabis resins in the plant-material. From the latter two tests, he found high

concentration of cannabis resins in the 20 samples. Based on the four tests, he concluded that the plant-material seized was "cannabis as is defined in s. 2 of the Dangerous Drugs Act 1952." The evidence of the chemist amply established that the plant-material was cannabis.

We saw no merit in this ground.

Thirdly, the complaints on behalf of the appellant were:

(1) the presence of six packages of cannabis of which only three were marked; and

(2) the missing of the tin of 'Code 10' hair-cream recovered from the waist pouch (exh P20).

We found no merit in the complaints.

As to (1) above (the six packages), it was in evidence that, upon initial discovery, the cannabis was wrapped in three packages but, upon being opened, each of the three packages was found to have already been split into two halves. This accounted for the presence of the so-called six packages. As to the markings, these were done by PW5 ASP Anuwar on the newspaper wrapping after the two halves of each of the packages were restored to the position as initially found. This explained why only three packages were marked.

As regards (2) above (the missing tin of 'Code 10" hair-cream), the respondent frankly admitted at the trial that its disappearance could not be accounted for. However, it was not contented before us, and we failed to see how this could have in any prejudiced the case of the appellant. It was not submitted, let alone shown, what materiality or connection the tin of 'Code 10' hair-cream bore with the three packages of cannabis recovered save that both were found in the same bag exh. P14.

Next, it was argued that the learned trial judge did not at all consider whether the cannabis was for the appellant's own consumption. We rejected this argument. It must be noted that the case of the appellant was **not** that the cannabis **seized** was for his own consumption. In his defence, he said that he bought from his friends RM30 worth of cannabis (which, according to him, was not the cannabis seized) for his own consumption and that he put it in a green bag. The learned trial judge rejected his story. Such rejection must necessarily mean that the appellant's version of purchasing the RM30 worth of cannabis for his own consumption was disbelieved.

Furthermore, relying on the failure to tender, as exhibit, the search-list prepared by PW5 relating to the articles seized from the appellant, learned counsel for the appellant submitted that the learned trial judge ought to have invoked s. 114(g) of the Evidence Act 1950 and presumed that the list, if produced, would be unfavourable to the respondent. The failure to produce, it was argued, was fatal to the case for the prosecution. *Alcontara a/l Ambross Anthony v. PP* [1996] 1 CLJ 705 was cited in support.

We saw no merit in this contention.

Illustration (g) of s. 114 of the Evidence Act 1950 provides that the court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. In the present case, investigation officer, PW7 ASP Zulyadeen bin Hj Ismail, under cross-examination, produced and indentified the search list. There was therefore no question of withholding the list. Counsel for the appellant could have, at the trial, demanded its being tendered as exhibit to show materiality, if any, but did not.

Alcontara a/l Ambross Anthony v. PP, supra, is distinguishable. There the trial judge relied on the search list to resolve the conflict in evidence whereas in the instant case before us, the learned trial judge did not rely on the search list at all.

Finally, it was contented that the learned trial judge had erred in invoking the presumption of trafficking under s. 37(da) of the Act based on the presumptions of possession and knowledge under s. 37(d) thereof. In his judgment the learned trial judge found the appellant to be in custody or control of the cannabis and, by virtue thereof, to have been in possession of the drug and to have known the nature thereof under s. 37(d) of the Act. The learned trial judge went further and said that because of the weight of the drug, s. 37(da)(vi) (ie, the presumption of trafficking) applied. He subsequently found the presumptions under both subsections unrebutted.

For this ground, learned counsel for both sides adopted the submissions of their respective learned colleagues in *Mohammad bin Hassan v. Pendakwa Raya* (Criminal Appeal No. 05-122-93) (yet unreported). For the respondent, however, it was further contented that the words “found in possession” in s. 37(da) included presumed possession.

We do not propose to repeat what we had said on this point in *Mohammad bin Hassan, supra,* save that we rely on the reasons given therein and that in our opinion, even where a specified drug reaches the minimum quantity stated in s. 37(da) of the Act, the said subsection cannot be rendered applicable merely because the presumption of deemed possession and deemed knowledge of the nature of the drug under s. 37(d) had been properly invoked. On the wording "found in possession" in s. 37(da), it is our view that to validly invoke the presumption of trafficking under the said sub-section, apart from meeting the required minimum quantity, there must be an affirmative finding of possession based on sufficient and admissible evidence.

Conclusion

To sum up, we found no merit in all the grounds except the one lastly mentioned. We had accordingly quashed the conviction, set aside the death sentence, and substituted therefor a conviction and sentence as stated earlier in this judgment.